

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

HOPE C PITCHELL
Claimant

AMERISTAR CASINO COUNCIL BLUFFS
Employer

APPEAL NO. 20A-UI-15520-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/26/20
Claimant: Appellant (5R)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.19(38) – Temporary and Partial Unemployment

STATEMENT OF THE CASE:

The claimant, Hope Pitchell, filed a timely appeal from the November 5, 2020, reference 01, decision that denied benefits for the period beginning July 26, 2020, based on the deputy's conclusion that the claimant requested and was granted a leave of absence, was voluntarily unemployed, and was not available for work. After due notice was issued, a hearing was held on January 25, 2021. Claimant participated. Jacqueline Jones represented the employer and presented testimony through Ashley Congdon. The administrative law judge took official notice of the following Agency administrative records: KCCO, DBRO, DBIN and WAGE-A.

ISSUES:

Whether the claimant was able to work and available for work for the period beginning July 26, 2020.

Whether the claimant was partially and/or temporarily unemployed for the period beginning July 26, 2020.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant attempted to establish an original claim for benefits that was effective March 29, 2020. The base period for said claim consisted of the fourth quarter of 2018 and the first, second and third quarter of 2019. At the time, the claimant attempted to establish the March 29, 2020 original claim, the only base period wages that appeared in the Iowa Workforce Development records were \$406.88 in wages that Ameristar Casino Council Bluffs paid the claimant during the third quarter of 2019. The claimant had additional base period wages in Nebraska, but those were not included in the monetary determination IWD mailed to the claimant on April 6, 2020. That monetary determination indicated that benefits could not be paid on the claim due to insufficient base period earnings. The claimant's Nebraska wages included \$3,835.97 for the second quarter of 2019 and \$2,885.70 for the third quarter of 2019.

In connection with her attempt to establish an original claim for benefits effective March 29, 2020, the claimant made weekly claims for each of the weeks between March 29, 2020 and May 30, 2020. The claimant discontinued her weekly claims after the benefit week period that ended May 30, 2020. The claimant discontinued her claim for benefits because she had returned to her employment at Ameristar Casino Council Bluffs effective June 5, 2020. The claimant continued to be interested in receiving unemployment insurance benefits for the period of March 29, 2020 through May 30, 2020.

In July 2020, an IWD representative recommended that the claimant *reapply* for unemployment insurance benefits. The claimant reapplied for benefits during the week of July 26, 2020 and established a new original claim that was effective July 26, 2020. By that time, the claimant had been back at work for several weeks. The claimant continued to be interested in receiving in unemployment insurance benefits for the period of March 29, 2020 through May 30, 2020. The claimant did not desire to receive unemployment insurance benefits for the period beginning and did not file any weekly claims for the period beginning July 26, 2020.

In connection with the original claim that was effective July 26, 2020, IWD obtained base period wage information from Nebraska and included the Nebraska wages in a corrected monetary determination the Agency mailed to the claimant on July 31, 2020. The claimant continues to be interested in receiving unemployment insurance benefits for the period of March 29, 2020 through May 30, 2020.

Since the claimant returned to her part-time bartender job at Ameristar effective June 5, 2020, she has continued to enjoy the same hours and wages as she has historically received from the employment. The claimant is scheduled on average for 24 hours per hour, three shifts, per week, but picks up additional hours. The claimant's wage during the relevant period has been \$6.88 per hour. The claimant's compensation includes tips, which average \$200.00 to \$300.00 per shift. The claimant has not been on a leave of absence at any point since she returned to the employment on June 5, 2020.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of

establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23(1) and (26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

...

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

Iowa Code section 96.19(38) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual

worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

If a claimant individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. Iowa Code section 96.7(2)(a)(2)(a).

The decision from which the claimant appealed concerned an original claim for benefits that was effective July 26, 2020 and whether the claimant was able and available for work during the period that began July 26, 2020. Because the claimant did not file any weekly claims for the period beginning July 26, 2020, the able and available issues, along with the temporary and partial unemployment issues, as they relate to the period beginning July 26, 2020, are moot. In any event, because the claimant was enjoying the same hours and wages for the period beginning July 26, 2020, the claimant cannot be deemed partially unemployed during that period and would not be eligible for benefits for the period beginning July 26, 2020. In the absence of weekly claims for the period beginning July 26, 2020, there is no need at this juncture for a decision denying benefits beyond the week of July 26, 2020.

In consideration of the claimant's continued interest in pursuing benefits in connection with the claim she attempted to establish March 29, 2020, this matter will be remanded to the Benefits Bureau for the following initial determinations. In light of the Nebraska base period wages being omitted from the March 29, 2020 original claim, may the claim that was effective July 26, 2020 be cancelled and may the claimant proceed instead on the March 29, 2020 claim? Did the claimant file a timely challenge to the April 6, 2020 monetary determination pertaining to the March 29, 2020 original claim? Is there good cause, based on belatedly received information concerning the Nebraska base period wages, to treat a late challenge to the April 6, 2020 monetary determination as a timely challenge? If it is possible for the claimant to proceed on the March 29, 2020 original claim, was the claimant able and available for work, but temporarily laid off during the period of March 29, 2020 through May 30, 2020?

Depending on the basis for the furlough the claimant referred to in her testimony, the claimant may want to consider filing a claim for Pandemic Unemployment Assistance (PUA) benefits. If the claimant was off work due to COVID-19, an application for PUA benefits may allow the claimant to bypass the obstacles presented in trying to cancel the July 26, 2020 original claim. See the **Note to Claimant**, below.

DECISION:

The November 5, 2020, reference 01, decision is modified as follows. The claimant was not on a leave of absence during the week of July 26, 2020 through August 1, 2020. The claimant was able to work, available for work, but neither temporarily or partially unemployed during the week of July 26 2020 through August 1 2020 and is not eligible for benefits for that week.

REMAND:

This matter is **remanded** to the Benefits Bureau for the following initial determinations. In light of the Nebraska base period wages being omitted from the March 29, 2020 original claim, may the claim that was effective July 26, 2020 be cancelled and may the claimant proceed instead on the March 29, 2020 claim? Did the claimant file a timely challenge to the April 6, 2020 monetary determination pertaining to the March 29, 2020 original claim? Is there good cause,

based on belatedly received information concerning the Nebraska base period wages, to treat a late challenge to the April 6, 2020 monetary determination as a timely challenge? If it is possible for the claimant to proceed on the March 29, 2020 original claim, was the claimant able and available to work, but temporarily laid off during the period of March 29, 2020 through May 30, 2020?



James E. Timberland
Administrative Law Judge

February 10, 2021
Decision Dated and Mailed

jet/kmj

NOTE TO CLAIMANT:

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.
- If you do not qualify for regular unemployment insurance benefits under state law and are currently unemployed for reasons related to COVID-19, you may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** For more information on how to apply for PUA, go to <https://www.iowaworkforcedevelopment.gov/pua-information>.